United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2288

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

vs.

BENNIE HINES,

Appellant.

On Appeal from Judgment of Conviction of the United States District Court for the Southern District of New York, Before Wyatt, J.

BRIEF FOR DEFENDANT-APPELLANT

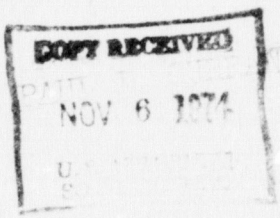

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TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

ISSUES PRESENTED

I

WHETHER THE GOVERNMENT FAILED TO ESTABLISH OPENING NET WORTH AND THEREFORE FAILED TO PROVE ITS CASE?

II

WHETHER THE GOVERNMENT FAILED TO PROVE THAT THE DEFENDANT HAD KNOWLEDGE OF AN OBLIGATION TO FILE A RETURN AND THEREFORE FAILED TO PROVE THAT THE DEFENDANT ACTED WILLFULLY?

III

WHETHER THE TRIAL COURT'S PRELIMINARY FINDINGS INDICATED THAT THERE WAS NO NECESSITY TO COME FORWARD WITH AN AFFIRMATIVE DEFENSE AND THEREFORE PREJUDICED THE DEFENDANT'S CASE?

STATEMENT OF THE CASE

Preliminary Statement

This appeal, pursuant to 28 U.S.C. §1291, seeks review and reversal of the judgment of conviction entered on August 23, 1974, in the United States District Court for the Southern District of New York by the Honorable Inzer B. Wyatt, United States District Judge, on a verdict by the Court finding the defendant guilty of the offense of failing to file income tax returns, Counts I, II, III, IV and V of Indictment 74 Cr. 268 for the calendar years 1968-1972. 26 U.S.C.§7203. (A 4-10a; 13-14a).

STATEMENT OF FACTS

The defendant was born in Memphis, Tennessee on November 8, 1940 and has lived in New York since some time in 1967. (A 222a). He is alleged to have engaged in the business of managing prostitutes during each of the indictment years and for a number of years before January 1, 1968, the start of the indictment period. (A 225-226a). The evidence with respect to these allegations is not in dispute.

Aside from the alleged source of income there are certain other facts which make this case unique. There is no

evidence that the defendant ever filed a tax return. (DX D; 204-206a, 224a).

The defendant is alleged to have used a variety of names at various addresses during the indictment years.

For the period prior to January 1, 1968, defendant was known to have listed a number of addresses outside New York City:

1. 3003 Cadillac Blvd., Detroit, Michigan. (GX 1).
2. 3303 Dexter, Detroit, Michigan. (GX 2).
3. 55 Walcott Terrace, Newark, New Jersey. (GX 32).
4. Defendant was also known to have resided in Memphis, Tennessee previous to January 1, 1968. (GX 107).
5. Defendant was also known to have resided in Chicago, Illinois previous to January 1, 1968. (A 138a).

The Government Investigation.

General

Since there was no direct evidence regarding receipt of income during the indictment period, the proof was entirely circumstantial. The Government relied on the net worth-expenditures theory in its attempt to prove its case.

The investigation was conducted during 1973 and during the trial. (A 62a, 68a, 121-123a, 125, 139-146a).

The investigation with respect to Hines disclosed the following facts:

Income Tax Records

The Government has no record of any tax return filed on behalf of the defendant for any year, including years not named in the indictment. (GX 3-10; DX D; 204-206a).

Social Security Records And Absence of Proof of Earnings

There were no earnings by the defendant beyond 1962 from which social security was deducted. (GX 24).

The Government has no knowledge of any wages or salary received by the defendant except for the income set forth in Government's Exhibit No. 24, for the years 1960, 1961 and 1962. (DX E; A 205-206a).

Real Estate Transactions-New York City

The Government's search of grantor-grantee records was limited to New York City. The defendant did not purchase or sell any real property in the New York City area during the period 1966-1972. (GX 30).

Surrogate Records

1. New York City: A search of the surrogate records in the five Metropolitan New York counties for the period 1966-1972 disclosed no inheritances by the defendant. (GX 26-29).

2. Memphis, Tennessee: Surrogate records were searched in defendant's birthplace the day before the trial. (A 183-184a). The search covered the period 1940-1972 and disclosed a small inheritance by the defendant as beneficiary under an insurance policy on the life of his father, who died October 24, 1952 in Cook County, Illinois. (GX 107). The corpus of this inheritance was completely disbursed to the defendant as of December, 1961. (GX 107).

Bank Accounts

NATURE OF THE SEARCH: The Government canvassed a total of 44 banks in the Borough of Manhattan and one bank in Lorain, Ohio to determine whether defendant had any accounts during the period 1966-1972 in those locations. (A 218-219a, 229a).

SCOPE OF THE SEARCH: The canvasses were made within the neighborhoods of five Manhattan apartments the defendant was known to have resided in after January 1, 1968. (A 129a; GX 35, 37, 14, 12, 16 and 110). The five Manhattan apartments testified to were as follows:

		Lease Signed	Lease Commenced As Of:
1.	400 E. 77th St. (GX 35)	4/4/68 (first lease)	4/1/68
	(GX 37)	2/26/70 (second lease)	3/1/70
2.	300 W. 55th St. (GX 14)	11/6/70	11/7/70
3.	250 W. 15th St. (GX 12)	11/20/70	12/1/70
4.	333 E. 34th St. (GX 16)	3/12/71	3/15/71
5.	1 Sherman Plaza (GX 110)	12/11/72	4/1/73

TIME OF THE SEARCH: 28 of the New York City banks were canvassed in September 1973. (A 125a). The remainder were canvassed during the trial. (A 141a-145a).

TRIAL COURT FINDINGS.

No tax return has ever been filed on behalf of the defendant for any year, including years not named in the indictment. (A 222-223a).

The defendant's expenditures during the indictment years were as follows: 1968, $15,000; 1969, $10,500; 1970, $11,000; 1971, $23,000; 1972, $15,500. (A 225a).

The defendant stated to a real estate agent on November 1, 1970 that his annual income was $25,000. (A 225a). The Trial Court failed to recognize that this item of proof was

stipulated out of evidence. (DX E; A 205-206a).

Surrogate records were only checked in New York City and Memphis, Tennessee. (A 227a).

The defendant spent whatever monies he had according to the old saying, "Easy come, easy go." (A 226a).

The defendant had no net worth in September 1960. (A 227-228a).

There were no earnings beyond 1962 from which social security was deducted. (A 228a).

The Government investigation discovered two bank accounts:

1. Chemical Bank of New York savings account in the name of Charles D-A-N-I-E-L. (GX 18, 19). His finding was based on evidence received subject to connection which was never connected. (A 52-53a, 188-190a). The account was in the name of a D-A-N-I-E-L while the defendant had been identified as having used the name D-A-N-I-E-L-S. (A 52-53a). There was no subsequent connection of the name D-A-N-I-E-L to the defendant. (A 188-190a).

2. New York Bank for Savings savings account in the name of Bennie Hines. (GX 32).

The Government investigation of real estate records in New York City for the period 1966-1972 showed no transactions by the defendant. (A 232a).

An installment purchase by the defendant in November 1967 is inconsistent with the defendant having a net worth at that time. (A 232a).

The defendant had a net worth of substantially zero on January 1, 1968 and on January 1 of each succeeding year covered by the indictment (1969, 1970, 1971 and 1972; A 233a).

The defendant had no net worth on January 1, 1971 because certain furniture was repossessed in December 1970. (A 234a; GX 49, 50).

The defendant had knowledge of the obligation to file a return because:

1. He could read and write.
2. He participated in business transactions.
3. He employed a pattern of concealment. (A 237a).

The defendant had the burden of producing some evidence of ignorance of the law. (A 238a).

The defendant is guilty on Counts I-V. (A 238-239a).

POINT I

THE GOVERNMENT FAILED TO ESTABLISH OPENING NET WORTH AND THEREFORE FAILED TO PROVE ITS CASE.

The Government Failed To Prove Its Case.

The Government must establish that the defendant was a person required by law to file a return for each of the years named in the indictment since this is an essential element of the crime. 26 U.S.C. §7203. Since the Government relied on the net worth-expenditures method of proof, an essential element of this case is proof of the opening net worth of the defendant as it was at the beginning of the indictment period. United States v. Schipani, 362 F.2d 825, 826 (2d Cir. 1966). The defendant respectfully contends that the Government failed to prove its case because it failed to establish opening net worth with reasonable certainty.

The United States Supreme Court demands that the Government establish an opening net worth with reasonable certainty. Holland v. United States, 348 U.S. 121, 132 (1954). Since the evidence clearly shows that the Government investigation failed in this respect, the trier of fact could not infer from proof of expenditures

during the indictment period that the defendant had, in fact, received more than the minimum gross income required for filing a return. In fact, the trial court's strong disposition at the close of the Government's case was to find that the Government failed to establish an opening net worth and therefore failed to prove its case. Note the significance of the following remarks:

THE COURT: I think the Government would agree there is no basis whatever for the net worth theory here. The Government promised that it would prove that at the beginning of the tax year -- What's the first year, 1968?

MR. GALLOP: That is correct.

THE COURT: -- The defendant had a zero net worth. There is no proof of that. I guess the Government concedes. There is not the slightest proof, not a scintilla of evidence.

MR. PADGETT: The Government's position would be we have asserted every reasonable effort to prove it and were not able to prove the net worth at the beginning or close of the year. (A 191a).

The Principles To Be Applied.

The expenditures method of proof is merely an outgrowth of the net worth method. United States v. Caserta, 199 F.2d 905, 906 (3rd Cir. 1952); Hoffman v. C.I.R., 298 F.2d 784, 786-787 (3rd Cir. 1962). Circumstantial evidence is the Government's chief weapon. Thus, in reviewing the conviction below, this Court has the duty of "bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." Holland v. United States, supra, 348 U.S. at 129; United States v. Slutsky, 487 F.2d 832, 840 (2d Cir. 1973).

This Court has held that the Government's investigation must establish a guarantee of essential accuracy in the circumstantial proof at trial as an element of the Government's proving guilt beyond a reasonable doubt. United States v. Slutsky, supra, 487 F.2d at 840. The defendant respectfully urges the Court to follow this principle in deciding the present case.

It makes no difference that Slutsky was a bank deposits case. This Court held that the requirement of a full and adequate investigation in a bank deposits case is based on a similar requirement in a net worth case. The adequacy of the Government's

investigation must therefore be examined and the Court must, as in Slutsky, direct its attention to the adequacy of the foundation underlying the computations introduced by the Government and the propriety of the investigation that led to those computations. Id. The critical question is whether the Government's investigation was sufficiently adequate to support the inference that expenditures during the indictment period were in fact attributable to gross income received during the indictment period. United States v. Slutsky, supra, 487 F.2d at 841.

The Proof And Where It Fails.

The evidence clearly shows that the Government's efforts were inherently inadequate and amounted to no more than a cosmetic investigation. Compare the quality of the investigation as regards expenditures with the quality of the investigation regarding opening net worth.*

Consider the items of proof from which the Court below concluded that the defendant had a net worth of substantially zero on January 1, 1968, the start of the indictment period. The Court must constantly bear in mind that January 1, 1968 is the key date.

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*The expenditure proof-GX 48-60, 64-105, 108.
The opening net worth proof-GX 24, 26-30, 32, 107.

An examination of the proof shows it to bear no relationship to the establishment of opening net worth on January 1, 1968, the beginning of the indictment period.

BANK ACCOUNTS-INVESTIGATION INADEQUATE AS TO TIME PERIOD COVERED.

For purposes of establishing opening net worth, the investigation must focus on pre-indictment years. In U.S. vs. Schipani, supra, 362 F.2d at 827, the evidence clearly showed that the Government made an exhaustive investigation into virtually every possible source of information concerning Schipani's economic circumstances over an 18-year period. Thirteen of those years were pre-indictment years. Id. And in Holland there were three indictment years (1946-1948) and the Government investigation went back as far as 1913, 34 pre-indictment years! 348 U.S. at 130, 133.

The investigation with respect to Hines did not even begin to approach the standards contemplated by the above decisions. The Government only went back two years from the start of the indictment period. (1966-1968). (A 126a). Defendant concedes there was some evidence to conclude that Hines was penniless in 1960. (GX 107). But clearly this did not relieve the Government of its investigatory burden as regards the years between 1960 and 1966.

BANK ACCOUNTS-INVESTIGATION INADEQUATE AS TO AREA COVERED.

Not only does the evidence show the Government's investigation to have been grossly inadequate with respect to the number of pre-indictment years covered, but is stretches all notions of credulity when the area of the investigation is considered.

The Government canvassed 45 banks. Forty-four of them were in the neighborhoods of five Manhattan apartments where the defendant was not known to have resided until after January 1, 1968. (A 129a, GX 35, 37, 14, 12, 16, 110). In fact, the earliest occupancy at any of the five Manhattan apartments was April 4, 1968. (GX 35).

The investigation of banks in the neighborhoods of apartments the defendant did not begin to occupy until after April 3, 1968, could have no possible bearing on the establishment of opening net worth on January 1, 1968.

The shallowness of the Government investigation is further exposed by the fact that the lease to one of the Manhattan apartments did not commence until April 1, 1973, three months after the end of the indictment period. (GX 110).

Thus, instead of conducting an adequate investigation into pre-indictment years and pre-indictment addresses, part of the Government investigation covered the area of an apartment that was not occupied until three months after the close of the indictment period. The conclusion is inescapable that this could have no bearing whatsoever on Hines' net worth on January 1, 1968, the start of the indictment period.

The only other bank which the Government visited was in Lorain, Ohio and this visit arose out of the fact that the defendant listed the bank as a reference on an apartment lease application. (A 130a, GX 15).

Bank accounts were not checked in any other city besides New York and Lorain. (A 218a, 229 a). There is absolutely no reason to justify the Government's failure to conduct an investigation with respect to Hines' addresses outside New York City for the period prior to January 1, 1968. There were at least five such addresses and the lack of investigation concerning them is as follows:

1. 3003 Cadillac Boulevard, Detroit, Michigan. (GX 1). No canvass of banks was made within this area. (A 133-134a).

2. 3303 Dexter, Detroit, Michigan. (GX 2). No canvass was made of banks within this area. (A 137a).

3. 55 Walcott Terrace, Newark, New Jersey. (GX 32). No canvass was made of banks within this area. (A 134-135a).

4. Chicago, Illinois. (A 138a). No bank canvass was made here even though the investigation revealed that the defendant resided in Chicago previous to 1966. (A 137a). No attempt was made to ascertain how long defendant resided in Chicago and the Government did not even know the precise year Hines came to New York. (A 138-139a). Arguably, only one pre-indictment year with any relevance on opening net worth was investigated.

5. Memphis, Tennessee. GX 107, shows Hines' birthplace to have been here. Yet no attempt was made to ascertain how long he lived here and no bank canvass was made within the neighborhood of any Memphis address. (A 134 a, 137 a).

Furthermore, the Government did not attempt to ascertain whether the defendant was married or not, though it admitted knowing

the name of a woman who was believed to be defendant's wife. The Government failed to check any bank records in the name of this woman. (A 135 a).

INSIGNIFICANCE OF THE TWO ACCOUNTS WHICH THE INVESTIGATION DISCOVERED.

1. Chemical Bank of New York savings account in the name of Charles D-A-N-I-E-L. (GX 18, 19). The trial court's finding here was clearly erroneous because this evidence was received subject to connection and was never connected. (A 52-53 a, 188 - 190 a). The account was in the name of a D-A-N-I-E-L while the defendant had been identified as having used the name D-A-N-I-E-L-S. (A 52-53 a). There was no subsequent connection of the name D-A-N-I-E-L to the defendant. (A 188 - 190a).

2. New York Bank for Savings Account in the name of Bennie Hines. (GX 31-33). The quality of this evidence is self-evident in light of the meagre Government efforts outlined above. That the defendant happened to have one account in New York City is clearly not the kind of proof which establishes a guarantee of essential accuracy in the circumstantial proof such that the defendant could be found guilty beyond a reasonable doubt. Not only was there reasonable doubt - the Government failed to establish a Prima Facie case. (A 191 a).

SURROGATE RECORDS - INADEQUATE AS TO AREA SEARCHED.

Up until the day before the trial, surrogate records were only checked in New York City for the period 1966-1972. (A 183-184 a, GX 26-29). This was absurd because the defendant had no family in New York. The Government, by investigating, concedes that they should have attempted to determine any inheritances by the defendant. In doing so, they first looked in a place where they could not find anything since there was no evidence whatsoever that the defendant had any family in New York. The absurdity of this is that during the trial the Government went to one place where there could conceivably be an inheritance and found one. Only at the suggestion of defense counsel did the Government bother to check out records in the defendant's birthplace. (A 196 a).

Clearly the Government failed to establish where the defendant's relatives outside Memphis resided and check the records in such areas. Though the Government had proof that defendant's father lived and died in Cook County, Illinois (GX 107), no attempt was made to determine any assets in that locality.

The Government therefore failed to meet its investigatory burden and the last minute attempt at the surrogate records in

Memphis only serves to prove that had a proper investigation been made, assets may well have been discovered.

The defendant squarely addresses the Holland principle that "once the Government has established its case, the defendant remains quiet at his peril." 348 U.S. at 138-139. Judge Weinstein's opinion after the second Schipani trial is highly illuminative. United States v. Schipani, 293 F. Supp. 156 (1968), affirmed, 414 F.2d 1262 (2d Cir. 1969). He held that the above principle does not mean that the defendant has any burden to come forward with evidence. It means that when the evidence of the Government becomes overwhelmingly persuasive the defendant runs the risk of the trier finding that the case has been proved beyond a reasonable doubt unless he can reduce its apparent probative force by producing contrary evidence. 293 F. Supp. at 162.

The defendant respectfully contends that the Government never established its case, let alone reach a point of overwhelming persuasiveness. The trial court's remarks at the close of the Government's case show that if anything, the trial judge was overwhelmingly persuaded that the case be dismissed. (A 191-200a, 212-213a).

Since the Government proof never reached the point

where it was so compelling that the defendant remained quiet at his peril, this aspect of Holland has no application to the facts of the case at Bar.

SOCIAL SECURITY RECORDS AND ABSENCE OF PROOF OF EARNINGS.

The proof here only shows that there were no earnings beyond 1962 from which social security was deducted. (GX 24).

With regard to all forms and applications submitted, the Government has no knowledge of any wages or salary received by the defendant except for the income set forth in Government's Exhibit No. 24, for the years 1960, 1961 and 1962. (DXE; A 205-206a).

It is proper to point out at this time that the trial court was clearly erroneous in finding that the defendant stated to a real estate agent that his annual income was $25,000. (A 47-48a, 225a, GX 15). This item of proof was clearly stipulated out of evidence. (DXE; A 205-206a).

REAL ESTATE TRANSACTIONS - INVESTIGATION INADEQUATE

The only grantor-grantee records checked for purposes of establishing opening net worth were in the New York City area for the period 1966-1972. (GX 30). With regard to this, the trial court made the following finding:

THE COURT:...What that means is probably not really critical. It's some indication of what the Government did by way of investigation but what else it means, who knows. (A 232a).

Defendant respectfully submits that the trial court was thoroughly correct that the above search is an indication of what the Government did by way of investigation. Taken in conjunction with the bank account and surrogate's proof, the grantor-grantee proof typifies the complete failure of the Government to establish a guarantee of essential accuracy in the foundation underlying the computations introduced at trial. United States v. Slutsky, supra, 487 F.2d at 840.

INSTALLMENT PURCHASE IN NOVEMBER 1967-DISCOVERY INSIGNIFICANT.

In the course of its investigation of expenditures by the defendant during the indictment period, the Government discovered that the defendant made an installment purchase in November 1967. (GX 50). The trial court, relying upon United States v. Schipani, supra, 293 F. Supp. at 158, found this significant as regards opening net worth on January 1, 1968. (A 232a). The Government's position is that an installment purchase of a relatively inexpensive item ($775.00) is inconsistent with the defendant having anything beyond a minimal net worth on January 1, 1968.

The defendant submits that the relevance of this item to opening net worth has been grossly exaggerated in light of the Government's inadequate investigation. A perusal of the facts in Schipani clearly shows that a single installment purchase is not to be considered in isolation.

The installment purchase in Schipani was merely one event in a series of events which corroborated other strong evidence that the defendant had not accumulated any cash reserve prior to the start of the indictment period. The evidence in Schipani showed that the defendant there repeatedly found difficulty in meeting his obligations during the pre-indictment period. 293 F. Supp. at 157, 158. It is especially significant that the Schipani investigation focused on pre-indictment transactions whereas with respect to Hines, the Government's only "thorough" investigation concerned expenditures during the indictment period. (A 56-67a).*

Unlike Schipani, there is no evidence regarding Hines' ability to meet financial obligations during the pre-indictment period, with one exception. That concerns the disbursement in September 1960 of $301.00 out of the life insurance proceeds for certain fees incurred on the ground that no other funds existed to pay the fees. (GX 107). The defendant has already

*The expenditure proof-GX 48-60, 64-105,108.

blunted the force of this proof (See brief at pg. 5) in that the defendant's financial status in 1960 did not relieve the Government of its investigatory burden as regards the period between September 1960 and January 1, 1968. Similarly, with regard to Hines' ability to meet financial obligations between September 1960 and January 1, 1968, the Government did nothing.

The defendant therefore respectfully submits that proof of a single installment purchase in November 1967, is clearly insufficient to establish a guarantee of essential accuracy in the computations which the Government introduced. Lacking this guarantee of essential accuracy demanded by United States v. Slutsky, supra, 487 F.2d at 840, the Government could not prove the defendant guilty beyond a reasonable doubt.

To allow a conviction to stand on the fact of a single installment purchase would be to completely disregard what the Supreme Court in Holland intended reviewing Courts to do when confronted with cases of this type.

THE TRIAL COURT'S FINDING THAT THE DEFENDANT LEAD AN EASY COME, EASY GO LIFE STYLE WAS CLEARLY ERRONEOUS.

The Government must prove that the defendant had a zero net worth not only on January 1, 1968, but also on January 1, of each succeeding year covered by the indictment. (1969, 1970,

1971 and 1972). The trial court found that the defendant had no net worth beyond a nominal amount on January 1 of each indictment year. This conclusion is based on the finding that it was the defendant's life style to spend his income as he received it and therefore at the end of any year, he would have no net worth beyond a nominal amount. (A 226a, 233a).

Defendant respectfully contends that the above findings were clearly erroneous. First of all, there was no proof that the defendant spent income as fast as he "received" it since there was no proof that he in fact received income during the indictment years. This is so because the Government never established an accurate opening net worth against which to relate expenditures. The Court could not find that the defendant was spending income as fast as he "received" it until and unless the Government first proved that he in fact received it. This is the entire basis of the net worth expenditure theory.

THE COURT:...but for 1968 I've got to find beyond a reasonable doubt that he had nothing to start with, and that he earned more than X dollars in that year, and I am telling you [the Government's attorney] that I can't find that he had nothing to start with. (A 197a).

In fact, the trial court noted the possibility that the

defendant's earnings through 1967 could have been enormous.

THE COURT: 1967 is not a count that is here involved, is it?

MR. PADGETT: That is correct, sir.

THE COURT: Well, then, since we know that the morals of the country are getting worse, his earnings through the girls in 1967 could for all I know have been enormous. They could have amounted to $100,000. (A 196a).

Secondly, it makes no sense to make a finding regarding the defendant's life style during the indictment period and then relate such finding back to pre-indictment years to conclude that defendant had a zero net worth on January 1, 1968. The defendant's conduct during the indictment years has no bearing on the issue of opening net worth at the start of the indictment period. As in other areas of the investigation, the Government failed to focus on pre-indictment years.

THE REPOSSESSION IN DECEMBER 1970 - EQUIVOCAL AT BEST.

In the course of its investigation of expenditures by

the defendant during the indictment period, the Government discovered that certain furniture was repossessed for non-payment in December 1970. (GX 49, 50). At most, this had a bearing on the starting point for Count IV, January 1, 1971. It had nothing to do with any other years covered by the indictment. Yet, the trial court relied on this item of proof to conclude that the defendant lead an easy-come, easy-go life style and therefore had a zero net worth at the beginning of each indictment year. (A 234a). This conclusion is precisely the kind of danger Holland seeks to avoid.

The defendant therefore contends that this proof must be considered in the same light as the single installment purchase. It was an isolated item of proof insufficient to establish the guarantee of essential accuracy which United States v. Slutsky, supra, 487 F.2d. at 840, demands.

POINT II

THE GOVERNMENT FAILED TO PROVE THAT THE DEFENDANT HAD KNOWLEDGE OF AN OBLIGATION TO FILE A RETURN AND THEREFORE FAILED TO PROVE THAT THE DEFENDANT ACTED WILLFULLY.

The Requirement of Willfulness.

26 U.S.C. §7203 makes it a misdemeanor for someone to willfully fail to file his tax return. This requirement of willfulness imposes a duty upon the Government to prove that the defendant had knowledge of an obligation to make and file a tax return.

Hargrove v. U.S., 67 F.2d 823 (5th Cir. 1933)

United States v. Vitiello., 363 F.2d 240 (3rd Cir. 1966)

United States v. Platt., 435 F.2d 789 (2nd Cir. 1970)

The Government concedes that knowledge of an obligation to file a tax return is an essential element of the crimes charged. (GOVT. POST-TRIAL MEMO. p.19).

Bishop v. United States, 412 U.S. 346 (1973) held that the word "willfully" means the same in both tax felony and tax misdemeanor statutes. "Willfully" means the bad purpose or evil motive described in United States v. Murdock, 290 U.S. 389, 398 (1933). Bishop v. United States, supra, 412 U.S. at 360-361.

The defendant respectfully contends that the Government failed to establish the requirement of willfulness since it failed to prove that the defendant knew of an obligation to file a return.

Having established that knowledge is an essential element of the crime, it is important to distinguish Hines' case from almost all other failure to file cases prosecuted under 26 U.S.C. §7203. The distinction is twofold:

1. Generally, the taxpayer has a history of previous filing before his failure to file tax returns for the years charged in the information.

2. The income or source of income is such that there is little or no dispute as to its taxable nature and in prior years (where returns were filed) the defendant considered this income to be taxable.

In this case, there is no evidence that the defendant ever filed a tax return. (DX D; A204-206a, 222a). There was no direct evidence whatsoever to indicate knowledge on the part of the defendant. The trial court relied completely upon weak circumstantial evidence. In fact, at the close of the case, the trial court acknowledged the evidence to be insufficient

to find beyond a reasonable doubt that the defendant knew of an obligation to file a return.

THE COURT:...Therefore, even if the concealment, without more, could be evidence of the defendant's knowledge, in this case it seems to me the evidence is equivocal, and I would have to say that I couldn't find beyond a reasonable doubt that the defendant knew that he had to file an income tax return, and so far as I know, there has never been -- I have not found a precedent for this type of case. (A 200a).

The Trial Court's Finding That The Defendant Had Knowledge Is Unsupported By The Evidence.

The trial court, in reaching an erroneous conclusion, relied on certain wagering tax cases which are clearly inapplicable to the case at Bar and on the unsound proposition that the obligation to file is a matter of "Almost Universal Knowledge." (A 235a).

THE WAGERING TAX CASES ARE CLEARLY INAPPLICABLE.

The trial court relied on a wagering tax case, Edwards v. United States, 334 F.2d 360 (3rd Cir. 1964), in accepting the Government's contention that proof of acts concealing the business which generates the income is sufficient to establish knowledge of the obligation to file.

It is respectfully submitted that the Edwards holding is based on considerations entirely different from the facts of the case at Bar. In Edwards, the defendants were engaged in the concealment of a particular type of business (gambling) subject to federal regulation. There was a much clearer motive for concealing the enterprise than is found in the present case. It could be inferred from concealment of the gambling activities that the defendants were aware of their amenability to federal regulation but sought to avoid it.

This consideration is entirely foreign to the present case since the Federal Government is not involved in the regulation of Hines' alleged occupation. Therefore no inference of knowledge can be drawn from mere acts concealing the defendant's occupation.

Moreover, the duties under the wagering tax provisions are automatically imposed on those engaged in the business of accepting wagers. 26 U.S.C. §4401. The nature of the business (gambling) bears a direct relation to the statutory duty imposed. Unlike Edwards, Hines' alleged occupation has no bearing on the elements of the crime charged beyond being the alleged source of income.

The trier of fact in Edwards was allowed to infer knowledge from the concealment of the business only after the Government proved

the defendants in clear violation of their duties under §4401 of Title 26. Concealment in the wagering tax cases is meaningful because compliance with the statutory duty forces one to admit criminal conduct. The statutory duty with respect to Hines only involves the failure to file a return. (Form 1040).

It is respectfully requested that the Court in considering the weight to be applied to the wagering tax cases, take into consideration the fact that all of these cases were decided prior to the United States Supreme Court decision in Marchetti v. United States, 390 U.S. 39 (1968). Marchetti held that the registration and occupational tax provisions could not be employed to punish persons who defended a failure to comply with the requirements of such provisions with a proper assertion of the privilege against self-incrimination. 390 U.S. at 61.

One can not help but speculate as to whether or not the lower courts would have been so liberal in imputing knowledge to the defendants in light of this decision. The dissenting opinion of Judge Brown in the Edwards case, 334 F.2d at 368-369, takes on even more significance in light of the Supreme Court's decision in Marchetti.

Circumstantial evidence of knowledge by showing acts of

concealment, while it may be of some evidentiary value in a non-wagering tax case, should not be given such weight as to establish the element of willfullness beyond a reasonable doubt.

There is also a significant factual distinction between the present case and Edwards regarding the scope of concealment. In Edwards there was a massive effort by the defendants to conceal everything regarding their gambling activities. Unlike Edwards, Hines has not been shown to have engaged in a scheme of total concealment. In fact, much of the Government's proof shows that the defendant in many instances made no attempt to conceal either his identity or his business activity.*

IT CAN NOT BE ASSUMED THAT THE OBLIGATION TO FILE IS A MATTER OF UNIVERSAL KNOWLEDGE.

To say that the obligation to file is a matter of "Almost Universal Knowledge" is to defeat the clear meaning of the statute. 26 U.S.C. §7203. Yet this is what the trial court did in inferring knowledge from the defendant's mere ability to read and write. (A 235a, 237a).

If it were a matter of universal knowledge, Congress would not have required knowledge and willfullness as elements of the crime. Congress would simply have made the mere failure to file a return a crime. The express requirement of willfullness clearly establishes

*GX 48-60,64-102,104-105,108.

that knowledge can not be presumed but must be proved. If the defendant must show a lack of knowledge, this would in effect, shift the burden of proof to him, something which runs contrary to a basic principle of our criminal law. The Government must prove every element of the offense beyond a reasonable doubt. Holland v. United States, supra, 348 U.S. at 138.

The defendant squarely addresses the principle relied on by the trial court that "where the law is plain, definite, and well settled, and any want of knowledge of its requirement is a fact resting peculiarly within the knowledge of the defendant, when the Government has established its case in all other respects, the burden of adducing some evidence to rebut the presumption of such knowledge rests on the defendant. Edwards vs. United States, supra, 334 F.2d at 367.

The above principle does not apply here since the Government failed to establish its case in all other respects. The Government failed to establish opening net worth. Therefore, the defendant had no burden to come forward with any evidence to rebut a presumption of knowledge.

Where the courts have found evidence to infer knowledge there was good reason for doing so. An attorney who prepared tax returns for others, Ripperger v. United States, 248 F.2d 944

(4th Cir. 1957); an attorney in the general practice of law who received a standard W-2 Form which on its face instructed the taxpayer to file a return, United States v. Cirillo, 251 F.2d 638 (3rd Cir. 1957) were both found to have knowledge of the requirement that they file a return. It can hardly be contended by the Government that this case has any similarity to those situations. On the contrary, they point out how improper it would be to presume that the defendant in this case had knowledge at the time he was required to file a return.

As pointed out by the trial court, Hines' case is unique in that the defendant never filed a tax return. (A 224a). In addition, a perusal of the Internal Revenue Code clearly indicates that it is no simple matter to determine whether or not income is to be considered gross income for purposes of a Federal Income Tax. §101-124 of Internal Revenue Code 1954.

For all of the above reasons, the defendant respectfully contends that the Government failed to prove that the defendant acted willfully within the meaning of §7203 of Title 26.

POINT III

THE TRIAL COURT'S PRELIMINARY FINDINGS INDICATED THAT THERE WAS NO NECESSITY TO COME FORWARD WITH AN AFFIRMATIVE DEFENSE AND THEREFORE PREJUDICED THE DEFENDANT'S CASE.

The trial judge as the trier of fact and the judge of law indicated his opinion as to the quality of the proof at the close of the Government's case. A perusal of the comments made at A 190-200a indicate that at that time the judge found both as a matter of law and as a matter of fact that the Government had failed to establish the guilt of the defendant.

It can not be denied that the court's remarks had to be a primary factor in the defendant's decision to rest at the close of the Government's case. (A 206a). In doing so, the defendant of course waived any opportunity to rebut any of the circumstantial inferences of guilt that the trial court subsequently relied upon.

In effect, the court below so prejudiced the defendant's position by its preliminary findings as to effectively deny to him a fair trial.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED, A JUDGMENT OF ACQUITTAL ENTERED, OR THE INDICTMENT DISMISSED.

Respectfully submitted,

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Attorney for Appellant

STATUTORY APPENDIX

26 U.S.C. §7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

26 U.S.C. §4401. Imposition of tax

(a) Wagers. - There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.-In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.-Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him. Aug. 16, 1954, c. 736, 68A Stat. 525; Sept. 2, 1958, Pub.L. 85-859, Title I, §151(a), 72 Stat. 1304.